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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TIME, INC.,

Appellant,

—against—

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

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April 22, 1966.

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IN THE

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TIME, INC.,	*Appellant,*	No. 562
—*against*—		
JAMES J. HILL,	*Appellee.*	

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

This brief is submitted in response to the brief for the appellee, and to the brief for the Attorney General of the State of New York, as *amicus curiae,* in support of appellee.

Question Presented

The question presented in the brief for the appellee (pp. 2-3) includes a conclusion of law (that the LIFE article was "fictionalized for advertising purposes and for the purposes of trade") which nearly begs the question before the Court. Similarly, the question presented in the brief for the *amicus curiae* (p. 4) rests upon its remarkable conclusion that appellant's publication was "not for the dissemination of news and ideas." We therefore reaffirm the comparatively neutral question presented in our main brief (p. 2).

ARGUMENT

I

APPELLEE'S FACTUAL ARGUMENTS ARE MISLEADING.

Apart from the recital by appellee of the facts of this case—a recital that is not drawn from an appraisal of the entire record nor from the opinions in his favor in the courts below—his fundamental error stems from treating appellant's article as a piece of fiction. Actually, appellee's brief very cleverly uses the terms "fiction" and "fictionalized" interchangeably (*e.g.*, p. 32), although as a result of the unfortunate legal parlance that has grown up in New York, there is a world of difference between the two. "Fictionalized" means exaggeration, embellishment, and inaccuracy (R. 438, 441). "Fiction", on the other hand, is well defined by appellee in his example supplied by Professor Toynbee (at p. 34n.):

> " 'When we call a piece of literature a work of *fiction* we mean no more than the characters could not be identified with any persons who have lived in the flesh, nor incidents with any particular events that have actually taken place.' "

If the Hilliards in the THE DESPERATE HOURS could not be identified with the Hills, and if their ordeal could not be identified with the Hill incident, then the false connection, if knowingly or recklessly made, should invoke the rule suggested in our main brief (pp. 39-41).

It is impossible, however, to reach that conclusion after comparing the play with the actual incident. More important, the concurring opinion in the Appellate Division, expressly affirmed by the court below, acknowledged that appellee and his family could have been properly identified

in the LIFE article without subjecting appellant to liability (R. 441). This fundamental concession, by which appellee is bound, is nowhere mentioned in his brief, nor can any reference to it be found in the brief for the *amicus curiae*.

1. *The Alleged Sexual Element.* In its effort to render false the connection between the Hill family and THE DESPERATE HOURS, appellee's brief repeatedly states that sex plays a major part in the LIFE article as well as in the play (*e.g.*, pp. 4, 5, 7). In fact, as a review of both documents plainly reveals, sex is simply not a part of the story except that, inevitably, there are female members in the Hilliard family just as in the Hill family. On two occasions in the play, not reflected in the LIFE article, the Hilliards' nineteen-year old daughter, Cindy (two years older than the Hills' eldest daughter, Susan, at the time of the actual event, R. 321), is leered at by one of the convicts (Ex. 15, pp. 74-76, 130). On both occasions the younger of the two convict brothers intercedes in the girl's behalf and abruptly terminates what might be considered an incipient advance (*ibid.*). At no time is the girl "pawed" (brief for appellee, p. 5). Indeed, the younger brother refers to her as "Miss" and is polite and even deferential toward her and her parents in the various scenes (Ex. 15 *passim*).

It is possible that the younger brother's civility was emphasized in the play because the author had observed the newspaper accounts that the Hills' captors were courteous —an element upon which great stress is laid in appellee's brief (*e.g.*, p. 7). In any case, these passing incidents involving the Hilliards' daughter scarcely project "sordid sexual implications" (brief for appellee, p. 4) out of the play nor, a fortiori, out of the LIFE article.*

*Implicit throughout appellee's brief is the notion that the LIFE article somehow incorporated the entire play by reference. If this were a libel case, the attempt to prove unfounded innuendo by extrinsic fact would be dismissed out of hand. See *O'Connell* v. *Press Publishing Co.*, 214 N. Y. 352, 108 N. E. 556 (1915); *cf.* Prosser, *Privacy*, 48 Calif. L. Rev. 383, 422-23 (1960).

2. *Other Elements of Alleged Difference.* After the element of sex, appellee's brief next turns to the element of violence (*e.g.*, p. 5). It is true that the violence in the Hill incident was limited to a gun battle in which the brothers were killed several days after they and the third convict had departed, but while still in possession of the Hills' automobile (R. 325). In the play, one brother is killed on-stage, and a trash collector is killed off-stage (Ex. 15, pp. 111, 178). The violence affecting the family, however, is limited to one occasion when the son is shaken without being injured (he is also twice held by the arm) (*id.*, pp. 46, 79, 173) and two occasions when Mr. Hilliard is struck without being severely injured (*id.*, pp. 46, 81-82). On another occasion the daughter, who is not herself assaulted, bites the hand of one of the convicts guarding her (*id.*, p. 78). Only the incidents involving the son and the daughter are depicted in the LIFE article (R. 16, 17); altogether the four incidents take up very little of the three-act play.

Finally, appellee goes so far as to suggest that appellant's description of the Hill family as heroic is also inaccurate and therefore the article cannot be considered laudatory (p. 40). In the actual incident the Hills did not attempt to escape and all of the family was confined during the one day of restraint; in the play an escape was thwarted and two members of the family were permitted to leave the house for short periods during the two days of restraint (R. 380-81; Ex. 15, pp. 60, 78-81). But the Hills refused to panic, carried on ostensibly as normal by getting meals and answering the telephone (while one of the convicts listened on an extension phone), and even turned away a caller who knocked at the door (R. 321-22; *cf.* Ex. 15, pp. 55-56, 97, 106). Their obedience to orders, especially the order that they refrain from calling the police for several hours following their release, revealed good judgment and undoubtedly explains why all the members of the family

emerged from their ordeal unharmed (R. 322). Their calm and good sense in the face of brandished shotguns (R. 321) more than justifies, we submit, a description of how "A Family Rose to Heroism in a Crisis."

In the same context, appellee seems to suggest that the real incident was not even tense or terror-filled (*e.g.*, p. 7). While the actual events may not have been as graphic as some of those dramatically created for the play, the forcible and armed entry into Mrs. Hill's kitchen, her detention along with the small children in a locked bedroom during the afternoon, meals under armed guard, the family herded for the night into one bedroom (guarded outside by Mr. Hill), the whimsical target practice at pictures on the wall, the cutting of the telephone wires, the robbery of Mr. Hill's cash, clothing, and automobile, and finally the threat upon Mr. Hill's life if the police were notified prior to 8:00 a.m. (Ex. D; R. 321-22, 325, 380-81), were eloquent testimony to the terrifying nature of the entire experience. It was so characterized the next day by one newspaper whose subheadline declared the family had been "Terrorized 19 Hours by Trio" (R. 321), and was not mitigated by another publication's ironic account (brief for appellee, pp. 3n., 17n.). The newspaper, quoting the police, described the escaped convicts as " 'desperate, armed and considered extremely dangerous' " (R. 321). Nonetheless, appellant's description of the event—"desperate ordeal" (R. 15)—is labeled a "categorical falsehood" (brief for appellee, p. 19).

It is apparent, contrary to appellee's rhapsodical treatment of the LIFE article—"pervasive falsity" (p. 39), "commercial concoction" (p. 42), "perpetrating a hoax" (p. 3), that THE DESPERATE HOURS in a very fundamental way *was* a reenactment of the Hill incident and that the LIFE article was accurate (and substantially more accurate than it needed to be to gain First Amendment protection). The "heart and soul" of the play (R. 202) was the tense

and gripping account of a middle-class family held hostage for a prolonged period in their own home by escapees of a nearby prison. The dramatic portrayal of that theme was developed by the author, assisted by a host of striking similarities which could have only been taken from the newspaper clippings (*e.g.*, brief for appellant, pp. 5-7).

The differences, for example, the attempt to escape, the off-stage killing of the trash collector who had knocked at the door, are superficial differences made necessary to portray vividly the feeling of tenseness that must have pervaded the Hill home throughout the ordeal. They were also required by the author's need to round out a three-act play. If THE DESPERATE HOURS had been a straight "documentary" (a description not used or suggested by appellant in its article or in any of the story drafts, R. 337-68), it would have been the shortest one-act play in history, because the terse description given by the Hills of their nineteen-hour captivity would have occupied but a few pages of script.* The Hills' account did provide the structure for the play, however, as the author testified when he stated that the caption "True Crime Inspires Tense Play" was certainly correct (R. 129) and that the Hill incident had "triggered the book in a very direct way" (R. 130, 151).

Indeed, the author's testimony indicated that he constantly worked from newspaper clippings (R. 86, 133). Prior to the LIFE article, he wrote in a review that THE DESPERATE HOURS was drawn from two such front-page accounts, one of the Hill incident and the other of a sub-

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* The emphasis on the word "re-enacted" in the article has been overdone, even if its ambiguous reference is to the Hill incident rather than, as seems more likely, to the plot of the novel mentioned in the preceding sentence. All plays produced on the stage (other than documentaries) are, by definition, works of dramatic fiction. While no play can duplicate an historical event word for word, gesture for gesture, scene for scene, or character for character, it may still properly be termed a reenactment of that occurrence. THE BARRETTS OF WIMPOLE STREET is an example.

stantially different occurrence in New York where a small girl was killed by a lone convict (R. 143-44, 427-28). (An interesting example of the author's conscious or unconscious reliance upon such news clippings appears in the novel when one of the convicts shows Mrs. Hilliard a news clipping, by way of an implied threat, and it reads as a virtually verbatim report of the New York incident, Ex. 12, pp. 30-31; R. 92, 427-28.)

It is thus not surprising that the literary critic for the Philadelphia Inquirer noted in reviewing the novel, two years before publication of the LIFE article, that "Philadelphia readers will recognize a slice of real life out of the fairly recent past" (R. 326).* The same connection, at about the same time, was made by many of the Hills' friends and business acquaintances. " 'Your story has been written up in a book. Have you read it?' " (R. 279). It was made by Mr. and Mrs. Hill themselves (R. 66, 277-86, 390, 413-14). "I felt it was very similar." (R. 281.)

Mrs. Hill stated soon after the event that she and the members of her family were "nearly frightened to death" by their experience (R. 289). The traumatic effect the experience had on the family is perhaps demonstrated in their subsequent behavior, by moving to a different state (R. 436), by Mrs. Hill's sharp reaction to the initial publication of the novel (R. 512), and finally by this very lawsuit. It is doubtful that the author, in his most extravagant imagination, could have created dramatic examples of the real fear and apprehensiveness that must have gripped the Hill family during their period of captivity. An entire family held hostage in their home by three escaped convicts is what

*This local reviewer was also capable of making an error. He referred to the Hill incident as one involving the home of a well-known Whitemarsh physician. Actually Mr. Hill, a non-professional, was employed as a sales manager of a hosiery plant, an occupation similar to that of his counterpart in the play, employed in the personnel office of a department store (Ex. 15, p. 25).

Hayes wrote about; an entire family held hostage in their home by three escaped convicts is what appellant reported when it emphasized the real event. Appellee goes so far as to assert that this story was not a public issue (brief for appellee, pp. 33-34). We submit, on the contrary, that it was very much a public issue. Our child-centered society is concerned not only with the quality of its theatre, but, much more, with the quality and safety of its family life. "He that hath wife and children hath given hostages to fortune." Francis Bacon, quoted in SORENSON, KENNEDY 2 (1965). *Cf. Pauling* v. *Nat. Review, Inc.*, 155 N. Y. L. J., No. 78, p. 17 (April 21, 1966).

II

THE FINDINGS BELOW IMPOSED LIABILITY BECAUSE OF INACCURACY AND COMMERCIAL MOTIVE.

Appellee's inferences, based on the jury verdict below, are untenable. The theory urged upon the trial court by counsel for appellee was solely concerned with the issue of truth or falsity (R. 306-7). That theory was tied to the infantile concept that has infected this litigation from the beginning, namely, the publisher's basic motive to increase circulation (*ibid.*). And the trial court stated, in overruling appellant's motion to dismiss, "I think that it is a question of fact as to whether the Life article was true or whether an inference could be obtained from reading it that it was not true. . . ." (R. 292).

1. *The Charge.* Not only did the court refuse to charge that a finding of a non-tenuous relationship between the incident and the play required judgment for appellant (R. 303, 310), it instructed the jury essentially by reading from the statute (R. 299-302) and charging that a verdict for appellee could be returned if the article constituted a

"fictionalized version for trade purposes", or, what the court stated to be the equivalent, was published "to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine or for some other material benefit" (R. 307).

It is apparent that the jury was left with the indelible impression that it could return a verdict for appellee simply by finding the article's statement of relationship between the incident and the play to be inaccurate. That impression was bolstered by the portion of the charge, quoted in the two opposing briefs, which qualified the theory of liability only in the case of "some incidental mistake of fact, or some incidental incorrect statement" (R. 301).

In addition, the opposing briefs have failed to quote one key portion of the charge:

> "You may only award exemplary or punitive damages against such defendant or defendants if you find from the evidence that such defendant or defendants knowingly referred to the plaintiffs without first obtaining their consent, and falsely connected plaintiffs with The Desperate Hours, and that this was done knowingly *or through failure to make a reasonable investigation.*" (R. 566.) (Emphasis added.)

Thus, the jury was permitted to award punitive damages merely because of the failure to make a reasonable investigation. That criterion in the charge nullifies appellee's claim that the jury verdict establishes the presence of actual malice or "deliberate concoction" (brief for appellee, p. 35n.).* See *Garrison* v. *Louisiana*, 379 U. S. 64, 79.

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*There is no support in the record for a contention that appellant was malicious or recklessly oblivious of the truth, and none of the opinions below so found. There was ample justification for the belief expressed by the LIFE writer that his article was "true and honest,"

Moreover, the jury was irretrievably misled when the court added that it could find for appellee if appellant used his name "for the purpose of making [the article] more interesting to its readers" (R. 304). If that were a constitutionally permissible standard of recovery in privacy actions, the press would be forced to shut down, except as to items involving public officials. We submit that the First Amendment not only protects against such a criterion, but goes much further by affirmatively encouraging the dissemination of ideas and the discussion of public issues. See *Rosenblatt* v. *Baer*, 86 Sup. Ct. 669, 675. Uninteresting and unread journals do not achieve that end.

2. *The Alleged Advertising Use.* Although there is no evidence in the record to support the allegation that appellant in any way collaborated in writing its article with the producers of the play or the publishers of the novel (already long in print), appellee continues to talk in terms of advertising use (brief for appellee, p. 41). The only cooperation involved derived from the arrangements for transporting the actors to appellee's former home and photographing them there (R. 112-115). A small part of the cost of that effort was borne by the play's producers, this being standard theatrical practice (R. 126, 148).

"completely truthful" (R. 250), and by the researcher that the article was "correct and accurate" (R. 266). Appellee attempts, however, to construct an inference of recklessness in his analysis of the editorial changes made upon the various drafts of the article (brief for appellee, pp. 13-17). Considerable emphasis is placed upon the elimination of the words "somewhat fictionalized" during the succession of drafts. The record discloses no ulterior motive for this deletion, other than the obvious tautology in the reference to a dramatic work. The real significance of the original words "somewhat fictionalized" lies in their tacit affirmance of appellant's good faith. The writer of the article was obviously not troubled by a juxtaposition in the same review of the words "actual event" and "re-enacted" on the one hand and "somewhat fictionalized" on the other. Indeed, had the words "somewhat fictionalized" been left in the final draft, presumably no liability could have been imposed under the theory of the opinions below.

Most significant of all, there is nothing in the record to suggest that the author of the play or its producers ever paid appellant for the article that was ultimately published. The undisputed testimony, in fact, unequivocally denies such a payment (R. 125). We do not dispute that appellant desires to sell its magazines and that the arresting style of its news reporting is designed in part to hold the interest of its readers and, thereby, to maintain and increase circulation. But the notion that LIFE gratuitously ran an advertisement for some independent organization's benefit is simply spurious. To the extent it is supported by a statement in the majority opinion of the Appellate Division (R. 438), that suggestion is without any support in the record and is precluded by the jury verdict in favor of the other defendants. Whatever may have been the trial theory of counsel for those defendants (see brief for appellee, p. 41n.), if the article was in fact an advertisement that had been purchased from appellant, the verdict could not have rationally exonerated the purchasers.

III

APPELLEE FAILS TO JUSTIFY THE ABRIDGEMENT OF THE PRESS IMPOSED BY THE JUDGMENT BELOW.

The legal arguments advanced in the brief for the appellee and in the brief for the *amicus curiæ* are so unresponsive to appellant's argument—based on the First Amendment and specifically directed to the conflict between the two sets of opinions below—as to require little comment. Both briefs develop truncated views of the New York law of privacy in the context of press freedom. Both pointedly ignore such cases as *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950), and *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257

N. Y. S. 800 (1st Dep't 1932). They do cite *Binns* v. *Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913), where the liability imposed for the defendant's exaggeration can hardly be deemed "wholly consistent with the constitutional guaranty of a free press" (brief for *amicus curiæ*, p. 11).

1. *Falsity.* It is apparent that appellee rests his theory of liability under the law of privacy upon the truth or falsity of the statements made. He presses that position in the face of this Court's consistent rulings, from *Cantwell* v. *Connecticut*, 310 U. S. 296, 310, to *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 271, that inaccuracy or falsity does not deprive expression of First Amendment protection. It has been suggested (brief for *amicus curiae*, p. 16) that this form of protection is only available to publishers of false statements about the official conduct of public officials. That position is unsound in light of such cases as *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445, unless, as has also been suggested (*id.*, p. 17; brief for appellee, pp. 39-40), the publication involved here is "utterly without redeeming social value." If the Court, after reviewing appellant's publication and the record, concludes that the former is utterly without redeeming social value in the context of *Roth* v. *United States*, 354 U. S. 476, 489, and, more recently, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts*, 86 Sup. Ct. 975, 977-78, then we agree that the judgment by all means should be affirmed.

In reality, liability was imposed below because the majority and concurring opinions in the Appellate Division objected to the manner of presentation of the LIFE article while conceding that appellee and his family could properly have been connected to THE DESPERATE HOURS (R. 438, 441). The *amicus curiae*, in reviewing the New York law, has correctly concluded that, under the prior decisions cul-

minating in the present case, only "minor inaccuracies" will save the publication from liability (p. 16n.). Such a standard, of course, shifts the burden of proof to the publisher and shows only a grudging regard for the commands of the First Amendment. Paradoxically, and aside from constitutional considerations, the original understanding of the privacy tort treated falsity as irrelevant. Warren and Brandeis noted that "obviously this branch of the law should have no concern with the truth of [*sic*] falsehood of the matters published." *The Right to Privacy*, 4 Harv. L. Rev. 193, 218 (1890). See also RESTATEMENT, TORTS § 867, comment d (1939) (the privacy rule does not "depend for its validity . . . upon the untruth of the statements").

2. *Prior Publicity.* Because of the importance of the question presented and our confidence that the Court will establish a protected area now that the New York statute is finally being reviewed, we have been willing to consider the impact of a loss of privacy upon a non-public figure. It should be remembered, however, that appellee was very much a public figure in the context of hostage stories before and at the time of the LIFE article. He convened a press conference on the day following the actual event (R. 32-34, 379). The day after that Mrs. Hill gave an interview to the press, in which she described the nineteen-hour captivity (Ex. D), followed by another interview two months later (R. 325). Within a few months, the news clippings before him, Mr. Hayes began work on his novel R. 81-82), and it was only two years after the actual event that THE DESPERATE HOURS was first performed on stage (R. 428). A few months thereafter, the LIFE article was published (R. 7). Although appellee believed that the book invaded his privacy (R. 69-70), and later entertained the same belief with respect to the play (R. 148), he made no effort to communicate with the author or publisher of the book or, later, with the producers of the play (R. 71). *Cf.*

Sperry Rand Corp. v. *Hill,* 356 F. 2d 181, 186 (1st Cir. 1966).*

Thus, appellee, who had only recently found himself in the news and afterwards connected to a dramatic portrayal of the actual event in a novel and subsequent play, should not be permitted, under the First Amendment, to torture this non-defamatory publication into an actionable invasion of privacy—any more than the survivors of the Titanic, even today, can expect to bury their story or others like it.

3. *The Criminal Sanction.* The brief for the *amicus curiae* (p. 18) deems frivolous our challenge to Section 50 of the Civil Rights Law, the criminal part of New York's statutory scheme for privacy. The argument runs in both opposing briefs that appellant has not been prosecuted under the criminal statute and, in any event, criminal prosecutions have been rare under Section 50. Appellee adds (brief for appellee, p. 42) that our attack upon the constitutionality of the statute has been as applied, and therefore cannot now be expanded to include a challenge to the statute on its face. (That very challenge, however, was advanced in the jurisdictional statement, pp. 11-12, 15-16, and in the brief opposing motion to dismiss or affirm, p. 8.)

There might be something to these contentions were it not for the opinions of this Court over the past several years. See, *e.g., Baggett* v. *Bullitt,* 377 U. S. 360; *Louisiana* v. *N. A. A. C. P.,* 366 U. S. 293; *Talley* v. *California,* 362 U. S. 60; *Smith* v. *California,* 361 U. S. 147. Indeed, the citation of *United States* v. *Raines,* 362 U. S. 17 (brief for *amicus curiae,* p. 19), is disingenuous at best. There the Court expressly exempted from customary

*When the present suit was finally instituted, on the other hand, the several publishers of the novel in its various forms were all joined as defendants (R. 60). All of their publications, as well as the opening of the play itself in Philadelphia, occurred prior to preparation and publication of the LIFE article (R. 176).

standing requirements First Amendment cases and cases where the person challenging the statute is within its possible reach. 362 U. S. at 21-23. Appellant, a publisher, is very much within the criminal reach of Section 50, and thus has standing to attack it for what it is, a criminal restraint upon expression:

> ". . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser. . . ." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486.

Nor does the comparative desuetude of the criminal section militate against our argument; if anything it demonstrates the wisdom of expanding traditional concepts of standing lest the Damoclean punishment be left perpetually suspended. See *Poe* v. *Ullman*, 367 U. S. 497, 536 (dissenting opinion). As the birth control cases have shown, ostensibly quiescent criminal statutes can suddenly become animated. *Griswold* v. *Connecticut*, 381 U. S. 479. More important, unlike the Connecticut contraceptive statutes, we have here a companion civil statute under which the highest court of New York has authoritatively spoken. It has declared, in effect, that appellant's conduct in the present case constitutes a misdemeanor and is indictable. The threat of prosecution thus becomes something less than remote, and anticipatory relief the only meaningful remedy. See *Elfbrandt* v. *Russell*, 34 U.S.L. Week 4347, 4348 (U. S. April 18, 1966).

Appellant's conduct is presently indictable because the liability-creating words in Section 50 are a Chinese copy

of the liability-creating words in Section 51.* As a result, apart from a possible limitations defense, appellant is not only now indictable but would stand virtually convicted from the outset. While the prosecution would have a stricter burden of proof, the elements to be proved are undisputed, namely, the publication, use of Mr. Hill's name, and inaccuracy. Whether or not appellant (or other publishers who follow it) is about to be prosecuted, it ought to be able to clear itself from the stigma of misdemeanant:

> "... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. ..." *N. A. A. C. P.* v *Button,* 371 U S 415, 432-33**

Finally, we hasten to add that Section 51 has its own "chilling effect" upon expression. See *Dombrowski* v. *Pfister, supra* at 487. It is very much a penal statute, providing for both punitive damages and prior restraints. *Cf. Speiser* v. *Randall,* 357 U. S. 513, 525. Indeed, the *amicus curiae* need not worry about enforcement of the criminal statute when he has an army of private enforcers to act under Section 51. The provision for injunctions is as effective as that under Section 22(a) of the New York Code of Criminal Procedure, which authorizes law enforcement agents to enjoin distribution of publications on the ground

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*In the face of the plain statutory language, the statement in appellee's brief (pp. 43-44) that Section 51 contains an independent definition of the prohibited acts can only be described as extraordinary.

**For the same reasons, appellee's contention that the question has not been raised is strained and hypertechnical. Appellant was careful to challenge the section as applied; its motion to amend the remittitur was not granted by the court below pro forma, but only after vigorous opposition by appellee who argued that the criminal section was not involved. See *Fiske* v. *Kansas,* 274 U. S. 380. Now that the statute has been drawn in question and is properly before the Court, its overbroad character can hardly be ignored.

of obscenity. And the Court has noted that crippling damage awards, including punitive damages, can be far more effective in retarding expression than criminal sanctions. See *New York Times Co.* v. *Sullivan, supra* at 277-78.

The brief for appellee fails to propose any constitutional rule of its own for application in the privacy field. Instead, both opposing briefs appear abundantly satisfied with the status quo. What suggestions they do advance are openly hostile to "the constitutional sanctuary for the press." See *Breard* v. *Alexandria,* 341 U. S. 622, 650 (dissenting opinion). They are also imprecise; they offer little succor to the lay publisher who "cannot be required to guess." See *Winters* v. *New York,* 333 U. S. 507, 515. If ever there were a guessing contest it is this eleven-year old litigation, throughout which appellee's pleadings and theories of liability have shifted and all attention has been ingeniously focused upon the minute details of a play appellant did not write.

The opposing briefs obviously dislike the literary style of LIFE magazine. We submit that that style is constitutionally irrelevant:

> ". . . On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California,* 314 U. S. 252, 265.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the main brief for the appellant, the judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted,

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April 22, 1966.

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